

1992

David T. Law v. Plaza Cycle : Brief of Appellee

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920190-CA

IN THE UTAH COURT OF APPEALS

DAVID T. LAW,

Plaintiff/Appellee,

vs.

PLAZA CYCLE,

Defendant/Appellant.

Case N° 920190-CA

Priority Classification 16

BRIEF OF APPELLEE

APPEAL FROM JUDGMENT OF THE THIRD CIRCUIT COURT, WEST VALLEY
DEPARTMENT, HONORABLE TYRONE MEDLEY, JUDGE

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FILED

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IN THE UTAH COURT OF APPEALS

DAVID T. LAW,

Plaintiff/Appellee,

vs.

PLAZA CYCLE,

Defendant/Appellant.

Case N^o 920190-CA

STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction of this matter pursuant to the authority granted by *Utah Code Annotated* § 78-2a-3(2)(d) (1953) as amended 1992 and specifically over this case by virtue of a Notice of Appeal filed by Appellant from a Judgment granted by the Third Circuit Court of Salt Lake County, West Valley Department, against Plaza Cycle.

STATEMENT OF ISSUE ON APPEAL

Appellant has appealed the single issue of whether the lower court properly interpreted the provisions of *Utah Code Annotated* § 78-27-56.5 (1953 as amended) in awarding appellee his attorney's fees incurred .

Standard of Review: This Court's review of the trial court's interpretation of statutes is under a correction of error standard. *State vs James*, 819 P. 2d 781 (Utah Sup. Ct. 1992): *Doelle vs Bradley*, 784 P. 2d 1176 (Utah 1989).

DETERMINATIVE STATUTE

Utah Code Annot. § 78-27-56.5 (1953 as amended)¹

STATEMENT OF THE CASE

Appellee, David T. Law, herein "Law", initiated an action in the small claims court based upon the failure of Appellant, Plaza Cycle, herein "Plaza", to complete repairs upon his vehicle in a good and workmanlike manner. Those repairs were undertaken by Plaza only after Law executed a written repair order on Plaza's usual and customary form. Following the filing of this matter in small claims court, Plaza, through counsel filed a counterclaim asking for attorney's fees of \$500.00 and punitive damages of \$2,000.00. The small claims court referred the matter to the civil division of the Third Circuit Court.

Trial was commenced on November 13, 1991 and Law's motion to dismiss Plaza's counterclaim was immediately granted. Plaza has not appealed from the granting of Law's

¹ Attorney's fees - Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.
1986

motion to dismiss its counterclaim. Following trial, the court took the matter under advisement , made and entered Findings of Fact, Conclusions of Law and Judgment in favor of Law. Plaza appealed from "that portion of the judgment by the West Valley Circuit Court which awards plaintiff/appellee attorney's fees (See Paragraphs 2 and 3 of Judgment.)"

STATEMENT OF FACTS

1. This matter was tried before the Honorable Tyrone E. Medley sitting without a jury on November 13, 1991² and December 2, 1991³.
2. The trial court received into evidence the written repair orders which had been signed by Law authorizing Plaza to make repairs upon his vehicle and agreeing to pay Plaza for those repairs.
3. The trial court made a finding of fact that the written repair orders which were received into evidence provided that in the event enforcement of the agreement is necessary Defendant [Plaza] shall be entitled to recover its attorney's fees.⁴
4. Plaza has not appealed any of the lower court's findings of fact, nor have they argued that the findings are unsupported by the evidence.
5. Plaza has not appealed from the judgment awarded to Law for reimbursement of his repair expenses which were paid to Plaza by Law.

²Record on Appeal p. 80

³Record on Appeal p. 81.

⁴Record on appeal p.49, ¶3

6. Plaza did file a supersedeas bond and obtain a stay of execution⁵ upon the entire judgment.

7. Plaza has made no offer to pay any portion of the judgment even though its appeal clearly seeks a review of the propriety of the award of attorney's fees only.

8. Plaza did not order a transcript in this appeal and has not argued that the evidence was insufficient to support the judgment. Plaza has cited neither the record on appeal nor any authority in its brief.

SUMMARY OF ARGUMENT

The trial court correctly interpreted the provisions of *Utah Code Annot.* § 78-27-56.5 (1953 as amended). Plaza has unnecessarily inserted language in the statute that simply was not included by the legislature.

Plaza argues that since it did not defend based upon the contract between the parties, Law was not entitled to recover attorney's fees based upon contractual provisions which would have allowed Plaza to recover its costs and fees had it sued upon the agreement.

Law argued in the court below that Plaza had breached the agreement between the parties by failing to make repairs in a good and workmanlike manner. Law further argued that the because written agreement provided that Plaza had the right to attorney's fees in the event it was necessary for Plaza to enforce its right to be paid under the agreement, then Law should likewise be entitled to recover his attorney's fees in the event Plaza breached its agreement to

⁵Record on Appeal p. 73-74

properly repair his vehicle. Law's argument, which was accepted by the court below, should be sustained on appeal; moreover, Law should be further compensated for his attorney's fees on appeal.

ARGUMENT

Clearly at the time Law took his vehicle to Plaza neither party knew what repairs would be necessary, nor what the cost of those repairs would be. Accordingly Law signed a repair order which set forth the complaints which Law had with the vehicle and provided that Law would pay the usual and customary charges for such repairs as Plaza made.

The usual and customary repair order which was used by Plaza provided among other things that in the event Law failed to pay for the repairs he would be liable for Plaza's attorney's fees in collecting the money due it for those repairs. The parties agreed that the repairs would be performed in a good and workmanlike manner.

Following the completion of the work done by Plaza, Law was notified of the fact, went to Plaza, paid for the repair, received from Plaza a paid notation on the repair order and picked up his vehicle. The repairs were not performed in a manner satisfactory to Law. Law returned the vehicle for further repair on two later occasions and paid additional money for those repairs. Law became frustrated with Plaza's failure to adequately repair his vehicle, sought repairs elsewhere and asked Plaza for a refund of his money. After being unsuccessful in his attempt to obtain a refund, Law sought redress through the courts.

Law originally filed a small claims action to recover money paid by him the Plaza for

repair of his 1983 Honda Odyssey off-highway vehicle. Plaza filed an answer and counterclaim in excess of the jurisdiction of small claims court and the matter was ordered transferred to civil jurisdiction. Law, then filed an amended complaint which set forth three causes of action. The first cause of action, upon which judgment was granted sounds in breach of contract for defective repairs. The second cause of action was for wrongful lien and the third cause of action was for battery.

At trial both Plaza and Law introduced the repair orders as proof of the amounts which had been paid Plaza⁶. Those repair orders were the evidence upon which the lower court granted judgment. The clear meaning of §78-27-56.5 is to allow recovery of attorney's fees by either party to a written agreement when at least one party is contractually entitled to recover in an action brought for breach of that agreement.

The lower court granted judgment against Plaza on Law's first cause of action for the amounts he had paid Plaza for the repair of his vehicle as evidenced by the written repair orders and for attorney's fees incurred in the prosecution of the first cause of action.

Plaza appealed claiming that they had not defended upon the contract, thus Law was not entitled to his attorney's fees in recovering the money he had paid Plaza on the contract.

LAW IS ENTITLED TO RECOVER HIS ATTORNEY'S FEES BASED UPON THE WRITTEN AGREEMENT BETWEEN THE PARTIES

Utah case law is well settled that absent a contractual or statutory basis the prevailing party is not entitled to recover attorney's fees incurred in litigation⁷. The written agreement

⁶Record on Appeal p. 44, Exhibits p-1, p-2, d2, d3

⁷ "The long standing rule in Utah is that attorney's fees cannot be recovered unless provided for by statute or contract." {citing authority} *Collier vs Heinz*, 182 Utah Adv. Rep. 53 at 54 (Utah Ct. of App. 1992)

between these parties provided for the payment to Plaza of attorney's fees in the event Law failed to pay for the repairs to his vehicle. The findings of the lower court⁸ are clear and are supported by ample evidence. Plaza has not even attempted to explain why the finding of the lower court should not be accorded deference here. Thus, the requirement of the statute that the "writing allow at least one party to recover attorney's fees"⁹ has been met and Judge Medley was fully justified in awarding Law his attorney's fees under the statutory basis.

Plaza argues in its brief that Judge Medley erred for two reasons. Law is unable to discern any distinction between those two reasons as they both appear to state that the error was based upon the fact that Plaza did not bring an action on the contract between the parties. Plaza has cited no authority for the proposition that *Utah Code Annot. § 78-27-56.5* (1953 as amended) applies only in situations where the action is brought by the party entitled to recover attorney's fees under the contract and thereafter the defendant prevails. Law has likewise been unable to find any such authority.

In *White vs Fox*, 665 P. 2d 1297 at 1300 (Utah 1983) Justice Durham writing for a unanimous Utah Supreme Court refused to adopt an exception to the general Utah rule¹⁰ which would provide for reciprocal application of one-sided attorney's fees provisions in contracts. In that case the appellant had urged that because the appellee would have been entitled to attorney's fees had appellee sued on the contract and prevailed, Utah should adopt a rule similar to statutes in Oregon and California which allow reciprocal enforcement of

⁸Record on Appeal p.49, ¶3

⁹*Utah Code Annot.*, §78-27-56.5 (1986)

¹⁰*White vs Fox, Id.* was decided prior to the 1986 adoption of *Utah Code Annot.* §78-27-56.5 (1986)

attorney's fees provisions where contracts are one-sided as to awards of attorney's fees. The Court stated "Utah, however, does not have a similar statute and we are not inclined to create one by judicial fiat"¹¹.

In 1986 the Utah Legislature adopted *Utah Code Annot.* § 78-27-56.5 which provides the reciprocity sought by Mr. Fox three years previously. Law has been unable to find any Utah cases interpreting this statute¹² since its adoption. Law is only able to suggest that its meaning is so clear that it has never been previously challenged. Judge Medley read those provisions, properly interpreted them and awarded Law his attorney's fees appropriately. Plaza's argument to the contrary is simply without merit.

LAW IS ENTITLED TO RECOVER HIS ATTORNEY'S FEES ON APPEAL

Utah law is equally well settled that where a party is entitled to attorney's fees as a matter of contract, then they are further entitled to recover their attorney's fees for defending the matter on appeal¹³. Our Supreme Court adopted the view that attorney's fees incurred on appeal are recoverable as a matter of course where there exists a contractual obligation to pay attorney's fees to the prevailing party¹⁴. It would seem unconscionable for Plaza to be allowed to appeal the issue of attorney's fees thereby effectively denying Law the use of his money during the appellate process and further diminish the lower court's award by failing to award

¹¹*White vs Fox, supra*

¹² *Utah Code Annot.* §78-27-56.5 (1986) has been annotated in an old Utah Advance Reports annotation as having two cases interpreting the statute; however, a reading of the cases does not reveal any citation or mention of the statute. They are *Agathangelides vs Shaw*, 740 P.2d 259 (Utah Sup. Ct. 1987) and *Elder vs Triax*, 61 Utah Adv. Rep. 3 (Utah Sup. Ct. 1987).

¹³*Rosenlof vs Sullivan*, 676 P. 2d 372 (Utah 1984); *Jenkins vs Bailey*, 676 P.2d 391 (Utah 1984)

¹⁴*Management Services vs Development Associates*, 617 P. 2d 406 at 408-409 (Utah 1980)

him the cost of defending his right to recover attorney's fees in this Court.

*LAW IS ENTITLED TO DAMAGES BECAUSE
PLAZA'S APPEAL IS FRIVOLOUS OR INTERPOSED FOR DELAY*

Moreover, it is difficult to discern Plaza's good faith in prosecuting this appeal. Utah R. App. P., 33 prohibits appeals for delay or frivolous appeals. Rule 33(b), Utah R. App. P., provides that "a frivolous appeal, motion, brief or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief or other paper."

In *Hunt vs Hurst*, 785 P. 2d 414,416 (Utah 1990) the Supreme Court adopted the definition of a frivolous appeal as "[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." The Court went on to note that in *Hunt* both the method of presentation on appeal was unprofessional and the appeal lacked merit, thus an award of damages was justified. One has to merely peruse Plaza's brief to find that it contains not a single reference to the record on appeal and the factual references that are contained in record on appeal do not support Plaza's arguments. In addition, the only reference contained in Plaza's brief to existing law is a statement that "...section 78-27-56.5 Utah Code Annotated (1953 as amended), which allows a Defendant to recover attorney's fees, where a Plaintiff brings an action on a contract which

contains attorney's fees and the Defendant recovers"¹⁵. Plaza has incorrectly added the words "Plaintiff" and "Defendant" to a statute which contains no such references. The statute itself seems crystal clear and inapposite to the principle urged by Plaza. Plaza has not urged that there exists a good faith basis for modifying, extending or reversing existing law. In fact Plaza has not canvassed existing law to any discernable extent in its brief.

In addition, Plaza's appeal has the appearance of being brought for the improper purpose of delaying proceedings. Initially, Plaza interposed a counterclaim in excess of the jurisdictional limits of small claims court which alleged that a prior proceeding was *res judicata* and adjudicated in Plaza's favor based upon its own failure to read the minute entry in which Law voluntarily dismissed his action **without prejudice**. At trial, Law's motion to dismiss Plaza's counterclaim was granted at the outset and that ruling has not been appealed. Upon judgment being entered and execution being issued, Plaza filed its notice of appeal on the portion of the judgment granting Law his attorney's fees, but it obtained a stay of execution upon the filing of a supersedeas **of all enforcement proceedings** even though it did not appeal from the underlying judgment, but only the attorney's fees portion. Plaza has by filing this appeal gained time which has been only for its own benefit.

Plaza initially lodged its appellant's brief before a briefing schedule was established and thereafter perfected the filing more than one month prior to its due date. Thus, in spite of appearances, Plaza's brief was not filed at the eleventh hour in an effort to meet time constraints. The brief itself is not the most professional presentation given its failure to reference either the record on appeal or citation of case law, not to mention numerous spelling

¹⁵Plaza Brief, Addendum to Defendant/Appellant Brief, pp. 3-4

errors. More significantly, the fact that Plaza failed to cite any case law at all or refer to the record on appeal has had the effect of increasing Law's cost of litigation. Counsel has been required to commence his research as if he were writing appellant's brief, rather than replying to it. Accordingly Law requests damages be awarded pursuant to Rule 33, Utah R. App. P.

CONCLUSION

The judgment of the lower court should be affirmed and the case remanded for a determination of attorney's fees and damages.

Respectfully submitted this 22nd day of July, 1992.



James A. McIntyre, Attorney for Appellee

MAILING CERTIFICATE

I certify that I served four copies of the foregoing brief by mailing same to Stephen L. Johnston, Attorney for Appellant, 431 South 300 East, Suite 109, Salt Lake City, Utah 84111 on the ____ day of July, 1992.

APPENDIX A

78-2a-3 (Effective 01/01/92). Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

78-27-56.5. Attorney's fees - Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

1986

Utah Rules of Appellate Procedure, Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good

faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.